protected monopoly providers of cable services. Nevertheless, even where cable companies are offering service, there is only one wire center in California in which three or more competitive companies are offering service to mass market customers.[346]

Based on MCI's experience with the state cases, the situation in California is replicated across the vast majority of the wire centers in the United States. Once the data is analyzed, there are at most a handful of wire centers in which three or more unaffiliated carriers are actively providing service to the entire mass market – including residential as well as business customers.

d. The Problem Is Not the Price of UNE-P

There is also no support for the oft-repeated claim that low-priced UNE-P is a barrier to UNE-L deployment. It has been said that the states are little laboratories,[347] and Connecticut has run the experiment that shows what happens when UNE-P prices are high, but other barriers remain in place. The Connecticut state commission has for years mandated relatively high-priced UNE-P, and as a result there has been virtually no UNE-P competition in Connecticut.[348] Since competitive LECs have switches in Connecticut, the unattractiveness of that state's UNE-P pricing should, under the BOCs' theory, have

---

346 *Id.* ¶ 49.

347 *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

348 MCI introduced its UNE-P-based products in the small slice of Connecticut served by Verizon in September 2002, and later in 2003 expanded to SBC's service territory. To MCI's knowledge, no other competitive LEC in the state provides UNE-P-based service.

led to UNE-L competition. In fact, there is no UNE-L competition for residential customers in Connecticut.[349]

6. Process for Continuing Review and Transition Mechanism

As explained above, the Commission should conclude, based on evidence of lack of actual deployment, and the existence of operational and economic barriers, that carriers currently are impaired without access to unbundled switching. To allow for the possibility that circumstances may change in the future, the Commission should have in place a procedure for continuing review that permits incumbent LECs to petition for a finding of non-impairment in a given market based on removal of operational and economic barriers. The task of evaluating such petitions could be delegated to the Wireline Competition Bureau. Incumbent LECs that argue for lack of impairment in particular markets should be required to prove with facts and verifiable economic analysis that a competitive LEC has a reasonable prospect of making a profit as a result of entering a particular market.

If the Commission were in the future to conclude that competitors are not impaired in particular wire centers without access to unbundled switching, it could at that point establish a necessary transition period. It is worth noting, however, that the transition mechanism established in the *Triennial Review Order* appears to be workable in several respects. There, the Commission found that competitive LECs should be prepared to submit orders for conversion of one-third of their embedded base of customers served by UNE-P within 13 months of the finding of lack of impairment; that

---

[349] *DPUC Implementation of the Federal Communications Commission's Triennial Review Order – Triggers*, Docket No. 03-09-01 PH01, MCI's Initial Brief at 6, 46 (DPUC Feb. 13, 2004).

orders for half the remaining embedded base be submitted within 20 months; and that the remaining orders be submitted within 27 months.[350]

MCI recommends that this schedule be adjusted to allow additional time for carriers to transition to a UNE-L environment. As noted, a number of customer-affecting issues currently prevent competitors from serving customers via UNE-L. Among other issues, there is no process in place among competitive and incumbent LECs for accessing customer service records, directory listings, and loop make-up information, nor is it clear that existing procedures regarding local number portability will work smoothly. Even assuming the Commission were to conclude (wrongly) that none of these customer-affecting issues is an operational barrier that supports a finding of impairment, the Commission must, in order to avoid significant customer disruption, allow sufficient time for carriers to address these deficiencies prior to transitioning consumers to UNE-L at mass market volumes. Accordingly, the Commission should adopt the following transition plan:

- First 14 Months from Finding of Non-Impairment – MCI has estimated that it would take 14 months for competitive carriers to obtain collocation and install the equipment necessary to serve customers via UNE-L.[351] MCI thus recommends that carriers should be permitted to continue to acquire customers via UNE-P during this period. Concurrently, incumbent and competitive

---

350 *Triennial Review Order* ¶ 532.

351 *See* presentation by Wayne Huyard, MCI, at slide 12 (Nov. 18, 2002), attached to Letter from Ruth Milkman to Marlene Dortch, FCC, CC Docket No. 01-338 (Nov. 19, 2002).

carriers should work together to develop and implement the procedures necessary to streamline UNE-L processing and eliminate the customer-affecting issues discussed above.

- Between 14 and 20 Months from Finding of Non-Impairment – To ensure that the necessary processes are in place to avoid service outages or delays due to customer-affecting issues, MCI recommends that carriers be required during this period to submit orders to convert 5% of their UNE-P lines. Setting the level at 5% will ensure that enough orders are processed to test the new procedures and uncover any deficiencies, but volumes will be low enough to permit carriers to address individual problems on a manual basis and avoid widespread service outages or delays. Carriers should be permitted to continue to acquire customers via UNE-P during this testing period.
- After 20 Months from Finding of Non-Impairment – Competitive LECs should be prepared to submit orders for conversion of one-third of their remaining embedded base of customers served by UNE-P within 20 months of the finding of lack of impairment; orders for half the remaining embedded base be submitted within 27 months; and the remaining orders be submitted within 34 months. After 20 months, carriers can no longer acquire customers via UNE-P.

Only by adopting a measured transition plan can the Commission ensure that appropriate procedures are in place and that UNE-L is working seamlessly before mass market volumes are reached.

Any transition plan also should appropriately reflect the BOCs' unbundling duties under section 271. In the *Triennial Review Order*, the Commission properly found that the BOCs have "an independent and ongoing" obligation under section 271(c)(2)(B) of the Act to provide access to loops, switching, transport, and signaling "regardless of any unbundling analysis under section 251."[352] The Commission also found that these network elements, when unbundled under section 271, must be priced on a just, reasonable and not unreasonably discriminatory basis, in accord with sections 201 and 202 of the Act.[353]

The Commission alone is the proper arbiter of whether network elements unbundled pursuant to section 271 are in fact priced in compliance with sections 201 and 202 of the Communications Act,[354] and this role will become all the more critical during any transition away from UNE-P. Competitive LECs are entitled to provide local service using access to just and reasonably priced switching pursuant to section 271(c)(2)(B) and section 201. The Commission should therefore require incumbent LECs to demonstrate that their rates are based on costs, and are just and reasonable, before allowing incumbent LECs to withdraw unbundled switching required pursuant to section 251.

---

352 *Triennial Review Order* ¶¶ 653, 654.

353 *Id.* ¶ 656.

354 47 U.S.C. §§ 201-202.

7. Rolling Access to Unbundled Switching Does Not Cure Impairment

In *USTA II*, the court directed the Commission to consider whether "rolling access" to switching would alter the impairment analysis for unbundled switching.[355] It does not. Rolling access does not address either the operational barriers or the economic barriers that have made UNE-L-based entry unfeasible. Specifically, while rolling access would permit acquisition of customers via UNE-P, and delay the time at which the customer was cut over to UNE-L, it would not address the following operational issues: UNE-L-to-UNE-L hot cuts; IDLC hot cuts; or volume of hot cuts in the absence of a mechanized system. Nor would rolling access address the economic barriers to entry, because the competitive LEC would still be required to incur all the costs required to use its own switch, including collocation, transport, and analog conversion equipment. The Commission should therefore conclude that rolling access to switching does not affect its finding that competitive LECs are impaired nationwide without access to unbundled switching.

B. The Commission Should Continue To Provide Unbundled Access To High-capacity Loop And Transport Facilities Below Certain Capacity Thresholds

USTA II does not call into question this Commission's conclusion that CLECs generally are impaired on a national basis without access to transport and loops below certain capacity thresholds. Indeed, that finding is now even more defensible than it was at the time the Commission made it. The ILECs had every opportunity to gather evidence to show non-impairment with respect to loops and transport in the state proceedings that began in the wake of the *Triennial Review Order*. But the evidence the

355 *USTA II*, 359 F.3d at 570-71; *see also Triennial Review Order* ¶ 521.

ILECs presented in those proceedings only underscores that CLECs are impaired below the capacity thresholds on virtually every route. It is now clear that the impairment is so widespread based on the evidence collected in the state cases that the Commission properly may rely on the capacity thresholds and find impairment ubiquitously for circuits below the thresholds. Alternately, the Commission is free to retain the safety valves it established for assessing the exceptional case in which there is non-impairment on particular routes and at particular locations – except that the Commission will not be able to rely on the states to make the ultimate legal conclusion concerning impairment or non-impairment. The Commission should itself make these determinations.

Specifically, with respect to loops, *USTA II* does not directly affect this Commission's conclusions at all. *USTA II* did not mention high-capacity loops in the text of the decision; nor did it vacate the Commission's national finding of impairment with respect to high-capacity loops below the designated capacity thresholds. Thus, the Commission need not take any action with respect to high-capacity loops. To the extent that it chooses to do so, however, the Commission can assume the role it previously delegated to the states to determine where there are exceptions to its extant finding that CLECs are impaired on a national basis without access to these loops.

As for transport, *USTA II* invalidated this Commission's national finding of impairment only because the finding was tied to the Commission's decision to delegate authority to the states to evaluate whether there were particular routes to which that finding did not apply.[356] The court suggested that in the absence of this safety valve, the Commission might not have found impairment on a national basis. But the Commission

356 *USTA II*, 359 F.3d at 573-74.

is perfectly free to readopt its national finding, and based on the evidence that will be put in the record here, it should do so. That evidence establishes that below the capacity thresholds competitors are impaired without access to the ILECs' bottleneck transmission facilities. The exceptional case in which there is no impairment can be addressed in a variety of ways, as set out below. Such an approach responds directly to the court's related directive that the Commission should explore alternative market definitions to determine which has lower error and other costs and to examine whether it is feasible "to define the barriers to entry in a manageable form."[357]

The availability of ILEC special access tariffed services does not change this analysis. It would be contrary to the statute for the Commission to consider ILEC tariffed services as part of its impairment analysis. In any event, the price of special access is so greatly in excess of the cost of the underlying facilities that carriers using special access as an input are caught in a cost-price squeeze that makes competition uneconomic. It would be administratively impossible for the Commission to engage in the multiple price-squeeze analyses that would be required to assess if there were particular routes where the cost-price squeeze was not so great as to make competition uneconomic at the current levels of incumbent LEC retail and special access prices. Because the ILECs have the ability to change both their retail and special access prices from one day to the next, the process would be too easily subject to abuse by the ILEC.

ILEC data showing CLEC reliance on ILEC special access is neither surprising nor relevant. It is not surprising because the ILECs' DS1 and DS3 loop and interoffice network is a crucial ILEC-controlled bottleneck, and the ILECs have sought to block

---

357 *USTA II*, 359 F.3d at 575.

access to these bottleneck facilities through any vehicle other than their access tariffs. It is not relevant because it fails to demonstrate that even the current level of competition is sustainable; for example, the fact that CLECs were able to compete using these tariffed services prior to the BOCs' entry into interLATA markets says nothing about the CLECs' ability to remain in the marketplace using tariffed services now that the ILECs are competing with the CLECs for interLATA business. In any event, the evidence suggests, at best, that even at current pricing levels competition is possible using special access only in some segments of the market.

1. Competitors As a General Matter Are Impaired Without Access to ILEC DS1 and DS3 Loop and Transmission Facilities Below Certain Capacity Thresholds

The Commission's national findings of impairment and non-impairment based on capacity levels as set out in the *Triennial Review Order* properly define appropriate barriers to entry in a manageable form fully consistent with the court's remand order.

Foremost, it is important to remember that the Commission *eliminated* unbundling on a nationwide basis for most transmission facilities. This remand concerns only the lowest-capacity loops and transmission facilities, where the Commission found little or no evidence of competitive deployment. Under the *Triennial Review Order* rules, a CLEC may obtain no more than 12 DS3s of unbundled transport on any given transport route, and no more than 2 DS3s of unbundled loops to any given customer location. This test addresses potential deployment – it is satisfied when the thresholds are met whether or not competitive alternatives are in fact available on a particular route or to a particular end office. And no loop or transmission facility of a higher capacity was subject to unbundling, again, without regard to whether there is any actual competitive deployment

on a given route.[358] This contrasts sharply with the *UNE Remand Order*, under which the ILECs were required to provide unbundled access to *all* transport and *all* loops everywhere.[359] The Commission explained that it could not "perpetuate such broad unbundling today"[360] and thus dramatically scaled back the extent to which the ILECs must make high-capacity loops and transport available on an unbundled basis. It did so, to repeat, even though it understood there might be some routes or locations on which CLECs would be incapable of deploying even these higher capacity loops and transport facilities.

For the transport facilities and high-capacity loops that fell below the capacity thresholds (and for dark fiber), the Commission found nationwide impairment based on the absence of competitive deployment on most routes and because such deployment was generally uneconomic. The Commission relied on empirical evidence that was corroborated in the most powerful way in the subsequent state cases. MCI's own experience is highly relevant: it is one of the largest facilities-based CLECs in the country, and has made multibillion dollar investments in local fiber networks over the past decade. Yet even MCI's network reaches only an extremely small percentage of buildings, while the ILEC networks reach virtually every building in the country.[361] And, MCI's network similarly reaches only a very small percentage of incumbent LEC central

---

358 *Triennial Review Order* ¶¶ 315, 324, 388-89.

359 *UNE Remand Order* ¶¶ 184, 323.

360 *Triennial Review Order* ¶ 389; *see also id.* ¶¶ 315-17.

361 Declaration of Linda Mills ("Mills Decl.") ¶ 5. Ms. Mills' declaration contains confidential information and is being filed concurrently with these comments under separate cover pursuant to the protective order in this docket.

offices nationwide.[362] To connect to the thousands of additional customers and LEC offices it needs to, MCI must make use of ILEC facilities.[363]

As to potential deployment, the Commission analyzed the enormous fixed and sunk costs of deploying loops and transport. With respect to loops, for example, it explained that "[c]onstructing loop plant is both costly and time consuming, regardless of the type of loop being deployed."[364] These costs include those associated with building access, the cost of deployment itself, and costs associated with delays that generally last 6-9 months.[365] Thus, "the loop itself can be overwhelmingly difficult for competitors to self-deploy due to the sunk and fixed costs associated with entry."[366]

As to transport facilities, the Commission found that "[d]eploying transport facilities is an expensive and time-consuming process for competitors, requiring substantial fixed and sunk costs,"[367] such as collocation costs, the cost of optronics, and the cost of burying or otherwise deploying the fiber, including the costs of "obtaining rights of way, digging up streets or attaching cables to poles."[368] Because the fixed and sunk costs for loop and transport facilities are similar at all capacity levels, "the potential

362 *Id.* ¶ 7.

363 *Id.* ¶ 8.

364 *Triennial Review Order* ¶ 205.

365 *Id.* ¶¶ 303-04.

366 *Id.* ¶ 348.

367 *Id.* ¶ 371.

368 *Id.* ¶ 382.

revenue stream that could be generated at each capacity level was a crucial determinant of impairment with respect to these elements."[369]

Application of the *Triennial Review Order's* capacity thresholds thus assures that there is virtually no possibility that the traffic carried over a given transport or loop facility below the threshold could generate enough revenue to cover the enormous fixed and sunk costs of constructing such a facility.[370] Thus, the Commission found that below these thresholds, "alternative facilities are *not* available to competing carriers in a majority of areas."[371] The 12 DS3 capacity threshold is highly unlikely to miss any cases in which the deployment of transport facilities on a route is feasible. In fact, the record in the *Triennial Review Order* proceeding makes clear that the minimum capacity that is sufficient to justify facilities construction on a route is substantially *greater* than 12 DS3s. In one of the *ex parte* filings cited by the Commission in the *Triennial Review Order* as support of the 12 DS3 limitation,[372] AT&T, which has as much experience building local networks as any CLEC, stated that the "*absolute minimum* 'crossover' point" was in fact *18* DS3s, and also stated that a more reasonable crossover point would

---

369 FCC Brief in *USTA II*, at 65 (Dec. 31, 2003) (citing *Triennial Review Order* ¶¶ 206, 303, 371 & n. 1133).

370 *See id.* at 66 ("The Commission identified meaningful distinctions among different capacity levels of transmission facilities. . .and reasonably concluded – on the basis of an absence of competitive deployment on most routes and because deployment is generally uneconomic – that CLECs generally were impaired without access to certain mid-level capacity elements as well as dark fiber.") (citing *Triennial Review Order* ¶¶ 320, 381, 386, 390-91).

371 *Triennial Review Order* ¶ 387 (emphasis added).

372 *Id.* ¶ 388 n.1205.

be between 28 and 36 DS3s.[373] Similarly, in the SNiP LiNK *ex parte* filing cited by the Commission, SNiP LiNK stated that it had constructed its own facility because it expected its demand to grow to the OC-48 level, not because it had reached 12 DS3s. In fact, SNiP LiNK stated that "it would not make sense for SNiP LiNK to construct a facility providing substantially the same capacity as its leased [12 DS3 capacity] OC-12."[374]

Moreover, the FCC found that even ILEC data showed that CLECs were collocated and using non-ILEC transport facilities in at most 13 percent of BOC wire centers.[375] The record showed deployment generally was unlikely to occur at these capacity levels at present given the relatively limited revenue potential and high cost of deployment.[376] Thus, for example, the Commission explained that, "[a] carrier

---

373 *Ex Parte* Letter from Joan Marsh, AT&T, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338, at 1 (Nov. 25, 2002) (emphasis added).

374 *Ex Parte* Letter from Steven A. Augustino, counsel for SNiP LiNK, to William Maher, FCC, CC Docket No. 01-338, at 2 (Feb. 7, 2003). The other *ex parte* filings cited by the Commission likewise do not suggest that competition is possible even at the 12 DS3 capacity threshold. The Allegiance, XO, and Cbeyond *ex parte* filings cited in the *Triennial Review Order* do not state that there is no impairment above the 12 DS3 threshold: those *ex parte* filings address the crossover point between *dark fiber* and incumbent LEC services, not the point at which a CLEC could justify building its own fiber network to the incumbent LEC office. *Ex Parte* Letter from Cathleen Massey, XO, to Marlene H. Dortch, FCC, CC Docket No. 01-338, at 1 (Feb. 5, 2003) ("XO's internal cost analysis shows that the rational cross-over point justifying the purchase and installation of electronics on leased dark fiber is actually at 12 DS3 equivalents."); *Ex Parte* Letter from Thomas Jones, counsel for Allegiance Telecom, to Marlene H. Dortch, FCC, CC Docket No. 01-338, Attachment entitled "Interoffice Transport Financial Analysis: Lit Transport vs. Dark Fiber for a Route" (Feb. 3, 2003); *Ex Parte* Letter from Patrick J. Donovan, counsel for Cbeyond Communications, LLC, to Marlene H. Dortch, FCC, CC Docket No. 01-338, at 2 (Feb. 13, 2003) (OC-12 level "provides a more realistic assessment of the cross-over point for feasibility of employing dark fiber").

375 *Triennial Review Order* ¶ 387 n.1198.

376 *Id.* ¶¶ 320, 325, 386-88, 390-92.

requesting only DS1 capacity transport between two points typically does not have a large enough presence along a route . . . to justify incurring the high fixed and sunk costs of self-providing just that DS1 circuit. This is because a requesting carrier in need of DS1 transport faces the same fixed and sunk costs as other carriers deploying transport . . ., but faces substantially higher incremental costs across its customer base than a carrier requesting higher capacity transport."[377]

The Commission's differentiation among loop and transport facilities based on capacity remains the most rational way for it to "define the barriers to entry in a manageable form."[378] There is no geographic market definition that the Commission could adopt to capture more accurately those instances in which CLECs are capable of deploying loops and transport facilities below the capacity thresholds (or, for that matter, where CLECs were incapable of deploying loops and transport facilities above the capacity thresholds). As the Commission repeatedly emphasized, there was no evidence in the record demonstrating *where* the limited deployment had occurred or where it would generally be feasible for CLECs to overcome the barriers to deployment.[379]

The granular route-by-route (and location-by-location) markets in which states were to assess non-impairment allow the most accurate assessment possible because findings with respect to a particular location or route will not be either under- or over-inclusive. They apply only to that route or location based on the Commission's longstanding recognition that the relevant geographic markets in telecommunications are

---

377 *Id.* ¶ 391; *see also id.* ¶¶ 303, 320 (similar finding for loops); *id.* ¶ 386 (similar finding for DS3 transport).

378 *USTA II*, 359 F.3d at 575.

379 *See, e.g. Triennial Review Order* ¶ 398.

point-to-point.[380] As the Commission explained, "the ability to recover the high fixed and sunk costs [of construction] is the key factor to considering impairment," and, in the context of loops and transport, that is largely a function of how much traffic a particular CLEC has on a specific point-to-point route, as well as the magnitude of the sunk costs, which vary based on the length of the route, terrain, whether fiber can be strung between telephone poles or must be buried underground, how long it takes to obtain rights-of-way, if these can be obtained at all, local engineering costs, and, for loops, the ability to gain access to individual buildings.[381] Loops and transport facilities, once built, cannot be redeployed to serve other routes. Accordingly, the mere fact that it is economic to build facilities along one route does not mean that it economic to build along any other route.[382]

In contrast, an assessment of impairment that is less granular would almost certainly be either irrationally over- or under-inclusive, as it would not be accurate with respect to many locations/routes within the geographic area. In that sense, it would "loftily abstract[] away from all specific markets,"[383] despite "evidence that markets vary decisively," and would do so even though "more nuanced alternatives," were available.[384] Thus, the Commission's national findings of impairment and non-impairment

---

380 *See, e.g., Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*"Pricing Flexibility Order"*); *Bell Atlantic-NYNEX Merger Order* ¶¶ 54-56; *WorldCom-MCI Merger Order*, 13 FCC Rcd 18025, ¶¶ 166 (1998).

381 *Triennial Review Order* ¶¶ 302-06, 371, 376, 410.

382 *Id.* ¶ 401 & n.1245.

383 *USTA I*, 290 F.3d at 423.

384 *Id.* at 425-26.

extrapolated from empirical and microeconomic evidence concerning where deployment is feasible to arrive at the most accurate generalizations possible on the existing record.

Developments since issuance of the *Triennial Review Order* have demonstrated the wisdom of the Commission's general approach. In the wake of the *Triennial Review Order*, states began proceedings to determine whether CLECs were impaired in particular locations or on particular routes. These proceedings emphatically demonstrated that this Commission's national findings of impairment were correct. In more than a dozen states, the ILECs did not even attempt to mount a non-impairment case for loops or transport. In 40 states, the ILECs mounted only a triggers-based case, not a potential deployment case, tacitly acknowledging that there is no evidence that deployment is economic on routes where it has not already occurred. And the evidence as to where deployment had already occurred demonstrated that there has been relatively limited deployment of transport and loops below the capacity thresholds anywhere in the country.

Michigan was the only state in which there was a preliminary decision concerning impairment in the proceedings this Commission established in the *Triennial Review Order*. In Michigan, a state with far more facilities-based competition than most other states, it became clear just how limited that competition was with respect to facilities below the capacity thresholds. For loops, SBC determined after extensive discovery that, in its view, there were just 39 locations in the entire state in which the retail triggers had been met (SBC asserted at least two competing providers had deployed OCn loops that could be channelized to DS3 loops at these locations), and 19 locations where the

wholesale triggers had been met.[385] Even in its potential deployment case, SBC claimed only that there were 186 locations within two narrow geographic bands in Southfield's business district and in the heart of downtown Detroit in which it was economically possible for competitors to deploy their own DS3 loops.[386] And the ALJ rejected even these limited SBC claims as factually unsound.

Similarly, SBC attempted to show non-impairment with respect to transport in only very limited areas in Michigan. SBC asserted that the self-provisioning trigger had been satisfied for transport for 27 routes statewide, that the wholesale trigger had been satisfied for only 49 routes, and that it was economically feasible for CLECs to deploy transport facilities (below the thresholds) only on these same 49 routes.[387] Once again, the ALJ rejected even these limited assertions, finding that SBC had failed to demonstrate non-impairment with respect to transport facilities below the capacity thresholds on any routes in Michigan. But even if SBC had demonstrated non-impairment on each of the routes and locations for which it had attempted to do so, this would have been only a small fraction of the routes and locations in the state.

The same is true in other states. While the ILECs were able to present evidence of some CLEC deployment of loops and transport facilities below the capacity thresholds, such deployment was generally quite limited. The analysis by QSI submitted in this docket demonstrates that in the 14 states QSI analyzed, the 14 states that were

---

385 *See On the Commission's Own Motion to Facilitate the Implementation of the Federal Communications Commission's Triennial Review Determinations in Michigan*, Case No U-13796, Notice of Proposal for Decision at 27, 31 (MI PSC May 10, 2004).

386 *Id.* at 34.

387 *Id.* at 39, 43, 46.

farthest along in their impairment cases, the ILECs only presented evidence of non-impairment on a tiny fraction of the routes and locations in each state.[388] And again, when erroneous evidence and legal claims were weeded out, the numbers were far smaller than even the tiny numbers the ILECs claimed.

In sum, the state proceedings have powerfully corroborated the Commission's judgment that competitors are impaired without access to DS1 and DS3 loops and transmission facilities below the capacity thresholds. The Commission thus promptly should reiterate its national finding of impairment. Such a finding would be entirely consistent with *USTA II*, because none of the analysis on the general impairment point from the *Triennial Review Order* was disturbed by the court's decision in *USTA II*.

After affirming its national findings of impairment, the Commission could either adopt safety valves to evaluate exceptions or could simply stop there. *USTA II* did not require the Commission to adopt safety valves to protect against any possibility that the Commission's rules would be over- or under-inclusive. To the contrary, the court expressly acknowledged the inevitability of some over- and under-inclusiveness.[389] It said there was a need for a more granular rule only "where there is evidence that markets vary decisively."[390] And even the ILECs explained in their opposition to the petitions for *certiorari* that, "[a]s the FCC has already acknowledged,. . . the 1996 Act and the D.C.

---

388 QSI Study, filed by CompTel/ASCENT *et al.*, WC Docket No. 04-313 & CC Docket No. 01-338 (Oct. 4, 2004).

389 *USTA II*, 359 F.3d at 570.

390 *Id.*

Circuit's decisions simply require the Commission to draw reasonable lines determining the classes of markets that are suitable for competitive supply."[391]

The capacity thresholds are certainly reasonable lines because there is no evidence that impairment varies decisively by market below those lines. To the contrary, the evidence is that at most there are a small number of exceptional cases where CLECs have been able to deploy facilities below these thresholds.

Thus, one option available to the Commission is to reiterate its national findings of impairment and not bother with safety valves. Such a rule would have the advantage of being simple to administer. It would be accurate in all but a very few cases. And it would continue to foment the competition that is the goal of the 1996 Act.

2. The Commission Could Step Into the Role Previously Assigned State Commissions to Address ILEC Claims That Exceptional Circumstances Are Present in Particular Instances in Which There is No Impairment

Alternately, if it so chooses, the Commission can rely on its national findings, and then step into the role it had previously assigned to the states to determine where there might be exceptions to those findings. Because *USTA I* had directed the Commission to assess impairment at a granular level, and because the Commission itself wanted to make an assessment that was as accurate as possible, the *Triennial Review Order* established safety valves for CLECs to show impairment on particular routes or locations above the capacity thresholds and for ILECs to show non-impairment on particular routes or locations below the thresholds. Indeed, the Commission made it far easier for the ILECs to show non-impairment below the thresholds than for the CLECs to show impairment

391 Brief for Respondents in Nos. 04-12, 04-15 & 04-18 at 14 n. 13 (Supreme Court, filed Sept. 1, 2004).

above the thresholds, as the latter required a waiver application to the Commission.[392] In contrast, states were to eliminate unbundling on routes for transport, and particular locations for loops, where competitors have actually deployed sufficient facilities to meet retail and wholesale triggers.[393] Unbundling could also be eliminated where it could be shown that the economic characteristics of the routes would support competitive supply.[394]

The court generally did not challenge this analysis. Instead, it rejected as an unlawful delegation the role the FCC had assigned to the states to address the exceptional case. One way for the Commission to respond therefore would be to readopt the national findings of impairment without any delegation. A second way would be for the Commission to adopt a waiver process to apply safety valves itself.

a. A Revised Approach to Loops

With respect to loops, the Commission could take on itself the role it had previously assigned to the states with respect to the retail and wholesale triggers. The Commission could readily evaluate any showing of non-impairment the ILECs attempt to make based on the triggers. The markets have already been defined, the data has already been gathered in state proceedings, and there will be relatively few routes or locations on which CLECs have deployed facilities sufficient even arguably to satisfy the triggers, as

392 *See Triennial Review Order* ¶ 411.

393 *Id.* ¶¶ 329-30, 400.

394 *Id.* ¶¶ 335, 410.

the state proceedings showed. Application of the triggers to these routes or locations thus will be largely a ministerial task, as the state proceedings also showed.[395]

As for the potential deployment inquiry, the Commission could also readily conduct this inquiry itself if it chose to do so. As explained, the ILECs did not even attempt to make such a showing in any but a handful of states and did not attempt a serious showing even in those states. Thus, it would be possible for the Commission to evaluate ILEC claims of potential deployment because there are likely to be few such claims. Nonetheless, conducting potential deployment inquiries for loops are likely to be administratively infeasible because each such inquiry *would have* to be location specific. One of the critical barriers precluding deployment of loops is limitations on building access – or even limitations on access to parts of buildings – and there is no way to conduct a potential impairment inquiry and find non-impairment without taking into account this very crucial data. But there is no need to do so. The evidence shows that there has been very little deployment of DS1 or DS3 loops, and the Commission has already found that deployment of such loops below the capacity thresholds is not generally possible. Given administrability concerns, it is preferable simply to apply the retail and wholesale triggers and not to assess further potential deployment.

---

[395] Most of the disputes at the state level with respect to application of the triggers concerned the meaning of the triggers with respect to transport. For example, the parties disputed whether the fact that a CLEC was collocated at two ILEC switches and could provide switched transport between the two of them counted for purposes of triggers meant to eliminate CLEC access to dedicated transport. There were fewer disputes with respect to loops.

b. A Revised Approach to Transport

With respect to DS3 transport, if the Commission wishes to address the exceptional case of non-impairment below the capacity thresholds, the Commission has available an option that is preferable to the approach outlined above with respect to loops. Although the Commission could simply apply the trigger and potential deployment inquiries it had previously delegated to the states, a better approach would be for the Commission to adopt a test under which the ILECs can demonstrate non-impairment on a particular route if they show that there are at least four fiber-based collocators that have collocated at both ends of a route (collocated CLECs that have their own transport facilities from each of the central offices).

While this test would not work for loops, as there are never collocators at both ends of the loop, the test is a reasonable way of capturing both actual and potential deployment for DS3 transport. And it is relatively easy to administer. In part, this is because, unlike the retail, wholesale and potential deployment tests, the fiber-based collocator test is a single test. And in part, this is because the ILECs have access to all of the data needed to determine where such fiber-based collocators exist without the need for any discovery and without the need to rely on data from state proceedings. The Commission could therefore permit the ILECs to come forward with this data for particular routes and then allow CLECs an opportunity to rebut the showing as to those routes or to otherwise show deployment is not economic on those routes.

The ILECs themselves relied on fiber-based collocators in the states in their effort to show the triggers had been satisfied. They did not attempt to show that CLECs were actually providing dedicated transport, much less transport at the DS1 or DS3 levels.

They simply assumed that CLECs with fiber-based collocations were providing such transport. This was not an accurate interpretation of the triggers. But the presence of such collocators is at least a reasonable surrogate for overall impairment with respect to DS3 transport. To begin with, the fiber-based collocation will encompass all instances of actual deployment. Every provider of dedicated transport on a route from A to B has fiber-based collocations at those endpoints. MCI is proposing a test of four fiber-based collocators because only a market with at least that many competitors even begins to approach competitive status and to demonstrate that other competitors can enter.[396] And because fiber-based collocators are not all providing dedicated transport, as we explain below, the test actually overstates the extent to which actual competition has developed, making the requirement of four fiber-based collocators a necessary minimum.

In addition to capturing actual deployment, the fiber-based collocation test also captures potential deployment. In many instances CLECs will have fiber-based collocations at points A and B but not have dedicated transport between those points. Because CLECs build their networks in fiber rings that require optical multiplexing and cross connections to establish dedicated transport, a CLEC often will have transport facilities between point A and its point of presence (POP), and between point B and the POP, but no transport facilities between point A and point B. The CLEC may not have a fiber ring connecting its collocations at all, or points A and B may be on different fiber rings. The QSI report shows that a review of records in 14 states revealed 488 routes

396 *See, e.g., 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, ¶ 289 (2003) (explaining that "both economic theory and empirical studies suggest that a market that has *five or more relatively equally sized firms* can achieve a level of market performance comparable to a fragmented, structurally competitive market").

with 4 or more fiber based collocators on the end of each route (and 961 with 3 or more collocators), but only 55 routes with 3 or more self providers of transport. In other words, in most instances where CLECs are collocated at points A and B, they are not providing dedicated transport between those two points at least at the relevant capacity levels. In such instances, the CLEC would often route traffic from A to B through its switch at (or adjacent to) the POP, making the traffic switched access traffic, not dedicated access traffic. Such transport would be more expensive because it makes use of switching as well as transport.

Nonetheless, in some (though by no means all) instances where the CLEC has fiber-based collocations at points A and B, the CLEC potentially could provide dedicated DS3 transport between those points even if it is not already doing so. In order to provide dedicated transport at a particular capacity level between points A and B, the CLEC could either construct transport facilities directly between points A and B, or, more economically, take the following three steps. First, if it wanted to provide dedicated transport on a wholesale basis, it would have to construct cross connects at points A and B between the CLEC for which it was providing service and its transport facilities. Second, it would have to construct a cross connect at the POP, so that some of the traffic flowing from A to the POP and B to the POP could flow from A to B (by way of the POP) without going through the switch. Third, assuming the transport facilities from points A and B to the POP were OCN level facilities designed to carry large amounts of switched access traffic back to the POP, the CLEC would have to channelize and multiplex the circuits carried at the OCN level so that it could provide transport at the DS3 or DS1 level. There are economies of scale associated with each of these steps, so

that it would not make economic sense for the CLEC to perform them without sufficient traffic.

For these reasons, a fiber-based collocator test would thus almost certainly be over-inclusive by presuming CLECs could deploy dedicated transport in some cases where it would not be economic for them to do so. Nonetheless, it would be a reasonable proxy for potential deployment. Where CLECs have deployed fiber-based collocations, they have at least overcome some of the most significant barriers to deployment of dedicated transport. It is not unreasonable to expect that at least a subset of the four CLECs that have collocated on both ends of the route have or could overcome the remaining barriers to provide DS3 dedicated transport in most cases. Conversely, however, when there are not even fiber-based collocators at the ends of a route eight years after passage of the Telecommunications Act, it is extremely unlikely that it is economic to deploy dedicated transport on that route. Because fiber-based collocation is necessary for CLECs to transmit even switched access traffic to their POPs on their own facilities, CLECs have generally invested in such collocations almost everywhere that it makes economic sense to do so.

Finally, the fiber-based collocation test should not be applied to find non-impairment with respect to DS1 transport. For DS1s, there is virtually no evidence that CLECs are self-providing DS1 transport anywhere. For just this reason, the Commission did not apply the self-provisioning trigger to DS1 transport.[397] And as the QSI report shows, there were only about 3.5 routes per state in which there were two wholesale providers of DS1 transport. The fact is that it is uneconomic for CLECs to provide DS1s

---

397 *Triennial Review Order* ¶ 409.